95-1287

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THOMAS J. FAUST, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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78 pp

QUESTIONS PRESENTED

1. Is the directed instruction to the jury on two requisite elements of a crime reversible constitutional error as violations of the Fifth and Sixth Amendments under United States v. Gaudin, 115 S.Ct. 2310 (1995), Sullivan v. Louisiana, 113 S.Ct. 2078 (1993), Sandstrom v. Montana, 442 U.S. 510 (1979), and In re Winship, 397 U.S. 358, 364 (1970)?

2. Can the government "take" and "criminalize" the disposition of private property under a "directed jury instruction", when that property neither belongs to itself under statute nor by contract under Armstrong v. United States, 364 U.S. 40 (1960)?

PARTIES

The caption contains the names of all the parties below

THOMAS J. FAUST, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

TABLE OF CONTENTS

Questions Presented ..... *i*

Parties ..... *ii*

Table of Contents ..... *iii*

Table of Citations and Appendix ..... *iv*

Opinion Below 1

Statement of Jurisdiction 1

Constitutional Provisions, Statute and Contract Involved 2

Statement of the Case and the Facts 4

A. The Procedural History, charges, convictions and Sentence 4

B. The Trial Court's Instructions to the Jury on "Ownership" 7

Reasons for Granting the Writ 12

I. The Petition Presents an Important but Unanswered Question on Federal Criminal and Constitutional Law 12

II. Conflict with Gaudin, Sullivan, Winship, ... 13

III. Conflict with Armstrong 16

Conclusion 18

Declaration of Service 19

TABLE OF CITATIONS

Cases cited:

Armstrong v. United States, 364 U.S. 40 (1960)..... 1, 16-18

Carella v. California, 491 U.S. 263 (1989)..... 1, 7, 14

Dennis v. United States, 341 U.S. 494, 500 (1951)..... 11

Faust v. United States, No 91-16557, 1992 U.S. App. LEXIS 29989, 1992 Westlaw 322052 (9th Cir. Nov. 6, 1992).. 5

Gilbert v. United States, 370 U.S. 650 (1962)..... 4

Harmon v. Marshall, 69 F.3d 963, (9th Cir.1995)..... 14-15

Hirabayashi v. United States, 828 F.2d 591(9th Cir. 1987)..... 5

Marine Midland Bank v. United States, 221 Ct. Cl. 496, 687 F.2d 395 (1982) cert denied 460 U.S. 1037, 103 S.Ct. 1427, 75 L.Ed. 2d 788 (1983)..... 13

Morisette v. United States, 342 U.S. 246 (1952) 16

Murray v. Carrier, 477 U.S. 478, 91 L.Ed. 2d 397, 106 S.Ct. 2639 (1986)..... 18

O'Neal v. McAnish, 115 S.Ct. 992, 130 L.Ed. 2d947(1995).... 11

Patterson v. New York, 432 U.S. 197 (1977)..... 8

Robinson v Arvonio, 115 S.Ct. 1247, 131 L.Ed. 2d 129 (1995)..... 11

Sandstrom v. Montana, 442 U.S. 510(1979)..... 1, 5-7, 12

Schlup v. Delo, 115 S.Ct. 851 (1995)..... 18

Sullivan v. Louisiana, 113 S.Ct. 2078 (1993).... 1, 4, 6, 7, 11, 14

Thompson v. Louisville, 362 U.S. 199 (1960)..... 8

United States v. Faust, 850 F.2d 575 (9th Cir. 1988)..... 14

United States v. Hartec Enterprises, 967 F.2d 130 (5th Cir. 1992)..... 12

United States v. Gaudin, 115 S.Ct. 2310 (1995)..... 1, 7, 10, 13-14, 18

United States v. Johnson, 268 U.S. 220, 45 S.Ct. 496 (1925)..... 13

United States v. Lawson, 925 F.2d 1207 (9th Cir. 1991) 13

United States v. Morgan, 346 U.S. 502, 511, 74 S.Ct. 247 (1954)..... 5

United States v. Parcel of Land, 507 U.S. 111 (1993)..... 16, 18

In re Winship, 397 U.S. 358 (1970)..... 1, 5, 8-10, 14, 15

Statutes Cited:

18 U.S.C. §496..... 4, 11- 13, 16

18 U.S.C. §641..... 4, 11-13, 16

18 U.S.C. §6641..... 16

28 U.S.C. §1254 (1)..... 2

28 U.S.C. 2255..... 8, 12

46 U.S. C. §971 (Maritime Liens- -Circa 1983)..... 3, 6

Section §9-320 of the Model U.C.C. 3

Rules of the Supreme Court

Rule 10.1(a)..... 2
Rule 10.1(c)..... 2

United States Constitution Cited:

Fifth Amendment..... 1, 4, 13, 14, 15

Sixth Amendment..... 2, 4, 10, 13, 15

APPENDIX

Appendix A- Opinion of the United States Court of Appeals, Ninth Circuit Filed July 10, 1995, Rehearing Denied November 15, 1995

Appendix B-- Opinion from U.S. District Court November 26, 1994

Appendix C-Excerpts from Faust's Initial Coram Nobis Brief in the United States Court of Appeals for the Ninth Circuit. filed pp 23-34.

Appendix D- Excerpts from Faust's Initial Habeas Corpus Brief in the United States Court of Appeals for the Ninth Circuit

Appendix E- Petitioners entitlement to coram nobis relief analysis as was submitted to United States Court of Appeals, Ninth Circuit-

THOMAS J. FAUST, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas J. Faust respectfully requests that a writ of certiorari issue to review the judgment and opinion of the U.S. Ct. of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion and judgment of the Ninth Circuit Court of Appeals entered on November 15, 1995 is unreported. The opinion is reprinted in the Appendix at 1a-b. The Unpublished written Coram nobis opinion from the District Court for the Northern District of California is reprinted in Appendix 1B--, The Unpublished Ninth Circuit Habeas opinion is available at 1992 Westlaw 322052, or lexis 29989 (1992). The published opinion on Direct appeal is cited at United States v. Faust, 850 F.2d 575 (9th Cir. 1988). None of these opinions discuss any of the previously raised constitutional violations of In re Winship, 397 U.S. 358, 364 (1970), Sandstrom v. Montana, 442 U.S. 510 (1979), Carella v. California, 491 U.S. 263 (1989), Sullivan v. Louisiana, 1131 S.Ct. 2078 (1993), United States v. Gaudin, 115 S.Ct. 2310 (1995) and Armstrong v. United States, 80 S.Ct. 1563 (1960).

STATEMENT OF JURISDICTION

The judgment and opinion of the Ninth Circuit, denying a petition for a writ of coram nobis and in effect affirming a judgment of conviction and sentence of the United States District Court for the Northern District of California, was entered on July 10, 1995. A petition for rehearing was filed. The decision denying a rehearing was

filed on November 15, 1995. App A-1. This petition for certiorari is being filed within 90 days of the November 15, 1995 final opinion and judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 10.1(a) and 10.1(c) of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation**.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, **the accused shall enjoy the right to a speedy and public trial, by an impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutory Provisions

Title 46 U.S. C. §971 (Maritime Liens- -Circa 1983)

> Any person furnishing repairs, supplies, towage, use of drydock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Section §9-320 of the Model U.C.C.

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Contract Provisions -

> TITLE TO AND POSSESSION OF THE VESSELS
> (1) the foregoing Secretary's rights under Section 2.04 *(insurance)* shall not apply (d) To Liens for repairs.
>
> "if the shipowner shall have incurred the loss, damage or expense in question, any such loss shall be paid to the shipowner in reimbursement if there is no existing default on which the underwriter has

written notice from the shipowner of the Secretary" Evidentiary Exhibit 4-c

STATEMENT OF THE CASE AND THE FACTS

A. The Procedural History, Charges, Conviction and Sentence

Petitioner Thomas Faust was general partner of a tugboat company and was an related owner of an affiliate Texas shipyard who was charged with violation of 18 U.S.C. §496 counts 1, 3, 5 forgery of checks in the amounts of $100,000, $31,369 and $28,348; and violation of 18 U.S.C. §641 and Counts 2, 4, 6 embezzlement of funds "owned by" or "belonging to" the United States of America. On June 1, 1986, Petitioner entered a plea of not guilty to the Indictment and the counts were tried before a Jury beginning January 7, 1987.

At his January 1987 trial in San Francisco, California, Faust was acquitted on two embezzlement counts. The convictions arose from three insurance reimbursement checks what were issued in the form of co-payee checks to both Mr. Faust's company Faustug and United States of America. Mr. Faust expended over $247,000 to repair his company's damaged tugboat. The government did not spend a cent. The government by statute and contract was not entitled to any of the insurance reimbursement proceeds.

On direct appeal, the Ninth Circuit reversed one of the forgery counts., citing that Appellant had agency status under Gilbert v. United States, 370 U.S. 650 (1962) United States v. Faust, 850 F.2d 575, 582 (9th Cir. 1988).

Petitioner again challenged his conviction in a habeas corpus petition under 28 U.S.C. §2255. For the first time, however, he challenged the "directed jury instructions". None of the directed jury instructions were ever objected to at the trial. The Habeas petition was dismissed after a Magistrate held an evidentiary hearing. At that time, Faust's new appellate attorney devoted over 15 pages of a trial brief to Jury instruction errors in violation of In re Winship, Sandstrom, and Sullivan. The dismissal was affirmed by the Ninth Circuit. Faust v. United States, No 91-16557, 1992 U.S. App. LEXIS 29989, 1992 Westlaw 322052 (9th Cir. Nov. 6, 1992).

However both the District Court and the Ninth Circuit ignored and refused to analyze or consider any aspect of the claimed Winship, Sandstrom, and Sullivan errors.

Petitioner completed his sentence and qualifies for coram nobis relief to vacate his conviction under United States v. Morgan, 346 U.S. 502, 511, 74 S.Ct. 247, 252 (1954), Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987). Petitioner filed with the District court and the Ninth Circuit an extensive Cause and Prejudice analysis proving that both his trial attorney or his direct appeal attorney over looked the Fifth and Sixth amendment constitutional errors claimed herein. The error of failing to permit a Jury to determine elements of the offense as charged is of such a fundamental nature as to be within the scope of coram nobis relief, "The right includes...as its most important element, the right to have the jury rather than the Judge, reach the requisite finding of "guilt", Sullivan v. Louisiana, 124 L.Ed. 2d 182, 188 (1993)

Faust filed the current revised petition for Writ of Coram Nobis on August 19, 1994 which contains a cause and prejudice analysis. See Appendix E, F. The District Court, Northern District of California denied the current

motion on November 2, 1994. The case was timely appealed to the Ninth Circuit. On July 10, 1995, a Motions Panel granted the government motion for Summary affirmance of a District Court denial of a Petition for Writ of Error Coram Nobis on the asserted reason "that the questions raised in this appeal are so insubstantial as not to need further argument".

B. Facts

January 1983, a tugboat belonging to Tractug Associates was enroute to Charleston when a storm damaged the vessel at sea. Seeking refuge, the tugboat went aground causing more damage. Due to the immediate requirement for the tugboat to be repaired, two shipyards participated in the repairs. One shipyard was paid directly by the marine insurance company and is not at issue here. The other shipyard, Valley shipyard located in Brownsville, Texas, an affiliate of Tractug Associates, incurred over $247,000 in cash expenses to restore and repair the tugboat. Valley Shipyard incurred a maritime lien under 46 U.S.C. §971-974 *(circa 1983)*. The repairs were all consummated by March 5, 1983 and the vessel was returned to service.

The insurance company possessed a maritime indemnification policy. The insurance company issued four checks to reimburse for the damage repairs.[1] The first

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[1]The fourth insurance check was for the borrowed Z-Peller parts belonging to Valley Shipyard. The insurance check was sent directly to the Maritime Administration and was for $74,000. The Bankruptcy Court Northern District of California in Case No: 3-83-02479 LK (in re Tractug Associates) ruled that the government has no security interest in the fourth check and the government holds no perfected security interest. The government was allowed to keep the fourth check as an offset for this criminal conviction.

check for $100,000 was mailed to Petitioner. It was issued as a co-payee check made out to both Faustug Marine and Secretary of Transportation. Petitioner contacted the Department of Transportation and was told that the government does not sign co-payee checks. The insurance company refused to reissue the check as a single payee check.

Petitioner relied on his integrated contract with the government to resolve the negotiation of the three checks.

The contract states:

1) the secretary's name is not required on negotiable instruments received in "the normal course of business";

2) the secretary waives all security interests on repair proceeds;

3) the government possess no security interest on anything not attached to the vessels and;

4) the repairer shall be directly reimbursed.

The government knew at all times that the repairs had been completed and that checks had been negotiated. Three years later, the government brought criminal charges after Petitioner filed a civil breach of contract suit. The governments defense attorney participated throughout the criminal prosecution of defendant.

C. The Trial Court's Instructions to the Jury on "ownership of proceeds"

At the criminal trial the charge to the jury directed a verdict of guilty on two of three elements of the criminal charges against the Petitioner.

The finding that the questions raised in this appeal are "insubstantial" directly conflicts with United States v. Gaudin,115 S.Ct. 2310 (1995). Gaudin, applied a long line of U.S. Supreme Court decisions including In re Winship, 397 U.S. 358, 364 (1970), Sandstrom v. Montana, 442 U.S. 510 (1979), through Carella v. California, 491 U.S. 263 (1988), Sullivan v. Louisiana, 113 S.Ct. 2078 (1993) which hold that a Judge cannot instruct a jury that an element of a crime has been found to be true or established, thus circumventing the government's obligation to present evidence to establish that element beyond a reasonable doubt as required by In Re Winship, 397 U.S. 358, 364. See also Thomson v. Louisville, 362 U.S. 199 (1960) (some evidence of guilt required for conviction), and Patterson v. New York, 432 U.S. 197, 210 (1977) (Burden of proof on prosecution for all elements of offense).

That key error occurred at the trial and resulting conviction of petitioner Thomas J. Faust, and petitioner has thereafter tried to get this fundamental error brought to the attention of (a) the U.S. District Court, and (b) the U.S. 9th Circuit. However, while this issue has been presented and raised by both a (a) petition under 28 U.S.C. §2255 and subsequent appeal and (b) a petition for writ of error Coram Nobis to the U.S. District Court and subsequent appeal, none of the courts have resolved this issue if they considered it.

Gaudin, applying Sandstrom, Carella, Sullivan and In re Winship, has found this error, and this issue, to be so substantial that it requires reversal of the respective convictions of the defendant involved. The issue, therefore, can not be deemed or termed "insubstantial", and that issue clearly and substantially exists in the case and aberrant convictions of Petitioner Thomas J. Faust.

As to the merits of this key and non "insubstantial issue", appellant noted that he was charged with "embezzlement" of government money due to appellant's execution of three co-payee checks made out jointly to Appellant's corporation and the U.S. Secretary of Transportation, said checks being reimbursement for $247,000 in money that only appellant Faust had personally expended to repair the tugboat ZP Chandon. See APPENDIX "D" pp.13) Not one cent of the money of the United States went into the repair of this vessel, and it was fully restored to seaworthiness prior to the insurance company issuing the checks in partial reimbursement to appellant for what appellant (and not the United States) had advanced to cause the repair and restoration.

Once again, the government placed not one cent into this repair, and therefore the repair money was a reimbursement to appellant only. The United States did not own this money and called no trial witness to attempt to establish that the government owned the proceeds of the three checks. The government circumvented its requirement to prove this element of the crime and have the Jury determine it beyond a reasonable doubt per In Re Winship, 397 U.S. 358, 364 by the normal required route of presenting witnesses by means of the jury instruction it submitted to the court, and given to the jury by the court as set forth verbatim at page 23, appellants opening brief, and herewith provided. At trial the court instructed as to the embezzlement charges 2, 4, 6 as follows (RT 5-561):

> **"I will now instruct you on the law of embezzlement, which is to be applied to counts two, four and six of the indictment.**
>
> **Title 18, United States Code Section 641 makes it a federal crime or offense for anyone to embezzle or steal any money or property belonging to the United States having a value of more than one hundred dollars.**

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the money or property described in the indictment belonged to the United States and had a value in excess of one hundred dollars at the time alleged;

Second: That the Defendant embezzled or converted such money or property to his own use or to the use of another; and

Third: That the Defendant did so knowingly and willfully with intent to deprive the owner of the use or benefit of the money or property so taken;

The payee of a check is the true owner or person to whom the check was payable. The term forgery means that the payee's endorsement on a check was written or signed without the payee's permission or authority."

Obviously, element One required that the government prove that "the money...described in the indictment belonged to the United States..." In a like manner, element Three i.e. "with intent to deprive the Owner of the use or benefit of the money..." required proof that the government owned the proceeds of the three checks. The government called no witnesses and presented no evidence that the money represented by the three checks belonged to the United States, but circumvented this requirement under in re Winship by the later instruction that:

> "**The payee of a check is the true owner or person to whom the check was payable**. The term forgery means that the **payee's endorsement on a check was written or signed without the payee's permission or authority**..." (RT 5-559)

These two instructions illegally circumvented the requirement under Winship that the government bear the burden to prove each fact and each element of the charged crimes beyond a reasonable doubt. Two of the three elements of this crime were thus illegally established by the instructions. In Faust's case, the Constitution requires that the jury find criminal intent beyond a reasonable doubt, but the district court's instruction omitted that element. The requirement of some mens rea for a crime is firmly imbedded. "The existence of a mens rea is the rule of, rather than the exception to the principles of Anglo American criminal jurisprudence" Dennis v. U.S. 341 U.S. 494, 500 (1951). Faust had a constitutional, statutory and contract right to the insurance proceeds which were all abrogated by the directed jury instructions.

This is surely not "an insubstantial" issue that can be disposed of in the manner being here done. Sullivan v. Louisiana, 113 S.Ct. 2078, 2081-83, 124 L.Ed. 2d. 182 (1993).

> "**It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably** guilty, and then leave it up to the Judge to determine ...whether he is guilty beyond a reasonable doubt. ...[t]o hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be would violate the jury trial guarantee." 2081-2082

Structural Constitutional error is never harmless. "When a court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." O'Neal v. McAnish, 115 S.Ct. 992, 130 L.Ed. 2d 947 (1995); Robinson v Arvonio, 115 S.Ct. 1247, 131 L.Ed. 2d 129 (1995).

Petitioner, in his brief at page 31, Appendix C summarizes the fact that the government placed no money in the repairs of ZP Chandon and supplemented that set of facts by the detailed declaration of C.P.A. Dudley Syler.

The government has never contended that the government ever advanced funds to repair ZP Chandon or that appellant Faust had not contributed every cent in making fully repair and restorations. The government stipulated to these facts in the 28 U.S.C. §2255 evidentiary hearing.

Appellant cited liberally from Gaudin and Winship at page 26 of the brief and a full and studied examination of pages 23-34 of this brief can not result in a conclusion that an "insubstantial" issue or issues are raised in this appeal. If the issues discussed in Sandstrom- Carella- Sullivan- and Gaudin are "insubstantial" issues, then the exactly equivalent issue presented by appellant Faust is not "insubstantial".

REASONS FOR GRANTING THE WRIT

I
THE PETITION PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION OF FEDERAL CRIMINAL AND CONSTITUTIONAL LAW

This case presents an important but unanswered question: Does a defendant charged with 18 U.S.C. § 496 forgery; and 18 U.S.C. § 641 embezzlement of funds have a constitutional right to have a jury determine, beyond a reasonable doubt, his guilt on the element of ownership and intent? Ownership and intent are essential elements of the offense created by 18 U.S.C. § 496 and 18 U.S.C. § 641, yet removed from the Jury's determination by directed verdicts in this case.

There also appears to be a conflict between the circuits on the underlying property rule utilized to convict Petitioner. The Fifth Circuit in United States v. Hartec Enterprises, 967 F.2d 130, 134 (5th Cir. 1992) called the Faust criminal conviction "plainly wrong". The Fifth Circuit panel of Judges decided that the government had only an unsecured lien interest on proceeds pursuant to Marine Midland Bank v. United States, 221 Ct. Cl. 496, 687 F.2d 395 (1982) cert denied 460 U.S. 1037, 103 S.Ct. 1427. 75 L.Ed. 2d 788 (1983). The Fifth Circuit stated:

> "What this case should have been. . . is a suit by the . . . government contract agency against the defendant of a civil nature as opposed to a criminal nature." Hartec, 967 F.2d, 134.

Ninth Circuit law is itself confused. United States v. Lawson, 925 F.2d 1207 (9th Cir. 1991) follows United States v. Johnson, 268 U.S. 220, 45 S.Ct. 496 (1925) holding that the government can not prosecute a government contractor for embezzlement if they have a debtor-creditor relationship with the government. Indeed, in May 1986 the government in summary judgment pleadings before the U.S. Bankruptcy Court, Northern District of California, Case 3-85-720 TC admitted that in 1983 it owed Faust's partnership $2,900,000. but claimed sovereign immunity so that they could not be held liable for failure to make shipyard construction reimbursements to the shipyard.

This case provides the opportunity to answer the important question of whether Gaudin requires that a 18 U.S.C. § 496 and 18 U.S.C. § 641 defendant be accorded the same right as Gaudin, to have the jury determine ownership and intent- an essential element of the government's proof.

II
CONFLICT WITH GAUDIN

The most recent court of appeals decision affirming Faust's conviction did not address the "ownership or intent"/ Gaudin issue, although Faust raised the Ninth Circuit's Gaudin opinion in his Ninth Circuit initial brief (and also in a motion for reconsideration).

The silence of the decision below on the Gaudin issue does not minimize the decision's conflict with Gaudin. Having been squarely presented with the Gaudin issue, the court of appeals should have addressed it. Instead they totally ignored it as well as Carella and Winship.

Appellant-defendant-petitioner Thomas Faust suggests application of the reasoning of the Ninth Circuit in Harmon v. Marshall, 69 F.3d 963, (9th Cir.1995):

> "Applying Sullivan v. Louisiana, __U.S.__, 113 S.Ct. 2678 (1993) and other Supreme Court authority, we have held that omitting instruction on, or otherwise failing to submit to the jury, one (*emphasis that of this court*) element of an offense is reversible per se. United States v. Gaudin, 28 F.3d 943, 951 (9th Cir. 1994) (enbanc), affirmed 115 S.Ct. 2310 (1995); United States v. Stein, 37 F.3d 1407, 1410 (9th Cir. 1994), cert den. 115 S.Ct. 1170 (1995). See also United States v. Hove, 52 F.3d 233, 236 (9th Cir. 1995): We recognize that harmless error analysis was not feasible in the face of such an omission.
>
> We may no longer consider the strength of evidence and determine whether it was so clear that the jury would have (emphasis that of this court) found the element of a crime to exist had it been properly instructed, but instead we must determine whether the jury was actually able to consider that evidence

under the instructions given by the Court."
Harmon v. Marshall, 69 F.3d 965-966.

In Faust's convictions before a jury in this case, the government had to prove beyond a reasonable doubt that the United States owned the proceeds of each of the three checks in question per In re Winship, 397 U.S. 358, 364. In fact, the government introduced no evidence that the United States owned this money, but circumvented this requirement by offering their own special instructions that told the jury that the payee of a check was the owner of the amount of money represented by that check.

The courts' error is reversible structural error under the Teague exception:

> The exception which applies here is for "new procedures without which the likelihood of an accurate conviction is seriously diminished." or which implicate "the fundamental fairness of the criminal proceeding." Teague, 489 U.S. at 311, 313. Any rule announced in Sullivan and its application to this case is central to an accurate determination of [defendant's] guilt and implicates the fundamental fairness of his trial.
> Harmon v. Marshall, supra

Thus there is no rule blocking application of petitioners prior established rights under Fifth and Sixth Amendment constitutional rights under *Winship, and Sandstrom both of which had been decided before [petitioners] trial took place, and* or which implicate "the fundamental fairness of the criminal proceeding." mandates the petitioner must be given a constitutionally fair trial.

The government in this case improperly moved for dismissal of the appeal of appellant Faust, and it was erroneously granted. Harmon v. Marshall, supra relying

on United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994) (En Banc), affirmed 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995)

The decision below conflicts with Gaudin because this court's analysis of the constitutional error in directing the jury instruction to the jury on an essential element of the crime is equally is equally applicable to 18 U.S.C. §496 and 18 U.S.C. §641. Certiorari should be granted and plenary review accorded Faust's claim that Gaudin applies to a 18 U.S.C. §496 and 18 U.S.C. §641 case.

III
CONFLICT WITH ARMSTRONG

At the District Court hearing, petitioner presented unrefuted sworn testimony from an independent certified public accountant that proves that when the government's own accounting rules are applied that the government had zero property interest under United States v. Parcel of Land, 113 S.Ct. 1126, 112 L.Ed. 2d (1993) and Armstrong v. United States, 364 U.S. 40 (1960). By criminalizing property through use of improper jury instructions, the government has committed a "taking" in violation of the Fifth Amendment. See supra Footnote #1. See Morisette v. United States, 342 U.S. 246 (1952) (direction of court removed intent element of offense held improper. 18 U.S.C. §6641.

The first, second and third insurance checks were issued for the same insurance claim as the fourth insurance check and are for the same identical purpose, indemnification for repairs of a marine accident.

Under Armstrong, supra, Mr. Faust has priority admiralty, contract and priority lien rights that supersede any inchoate rights that the government may claim.

"We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens.

*** ***

While the Government was obliged to make progress payments based on the percentage of the work completed, nothing in the contract provided that ownership of the portion of the work paid for should vest in the United States. On the contrary, it was stipulated that all progress payments should be secured by a paramount government lien on the property. ... In their totality, these provisions clearly recognize that title was to remain in Rice during performance of the work, and show that private liens could attach to the property while Rice owned it.

*** *** ***

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people to bear burdens which in all fairness, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here. Cf. Thibodo v. United States, 187 F.2d 249 (9th Cir)

Armstrong v. United States. 364 U.S. 40, 42, 43, 49 (1960)

A lien is a property right which can not be taken without just compensation, yet that is what the instructions to the jury did in the instant case.

CONCLUSION

For the foregoing reasons certiorari should be granted and this case should be accepted for plenary review. In the alternative, certiorari should be granted and the decision below vacated and remanded for consideration in light of this Court's decision in *Gaudin*, *Sullivan*, *Carella*, *Winship* and *Armstrong*. Petitioner meets the established actual innocence standard and is a "victim of a fundamental miscarriage of justice rule" of Murray v. Carrier, 477 U.S. 478, 91 L.Ed. 2d 397, 106 S.Ct. 2639, 2649 (1986). Manifest injustice and factual innocence are presented in violation of Schlup v. Delo, 115 S.Ct. 851 (1995), United States v. Parcel of Land, 113 S.Ct. 1125 (1993).

Respectfully submitted,

Allen E. Shoenberger

February 12, 1996

Professor Allen E. Shoenberger
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THOMAS J. FAUST , PETITIONER
vs.
UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

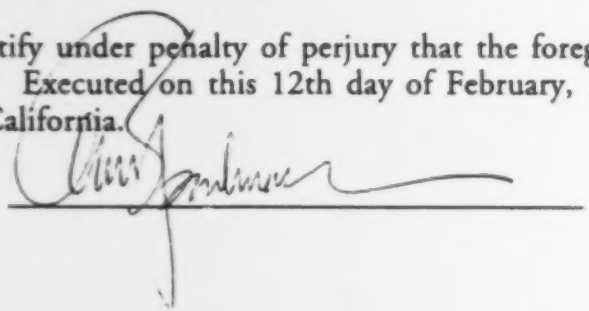
DECLARATION OF SERVICE BY MAIL

The undersigned hereby certifies that a copy of the foregoing:

I, Thomas J. Faust, do swear or declare that on this date, February 12, 1995, pursuant to Supreme Court Rule 29.3 and 29.4, I have served the attached PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly address to each of them and with **first-class postage prepaid**.

Office of the Solicitor General
Department of Justice
Tenth and Constitution Avenue, N.W.
Washington, D.C. 20530

I certify under penalty of perjury that the foregoing is true and correct. Executed on this 12th day of February, 1996 in San Francisco, California.



APPENDIX

APPENDIX

Appendix A- Opinion of the United States Court of Appeals, Ninth Circuit Filed July 10, 1995, Rehearing Denied November 15, 1995

Appendix B- -Opinion from U.S. District Court November 26, 1994

Appendix C- Excerpts from Faust's Initial Coram Nobis Brief in the United States Court of Appeals for the Ninth Circuit. filed pp 23-34.

Appendix D- Excerpts from Faust's Initial Habeas Corpus Brief in the United States Court of Appeals for the Ninth Circuit

Appendix E- Petitioners entitlement to coram nobis relief analysis as was submitted to United States Court of Appeals, Ninth Circuit-

Appendix A

Opinion of the United States Court of Appeals, Ninth Circuit Filed July 10, 1995,
Rehearing Denied November 15, 1995 **unpublished**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS J. FAUST,	)	No. 94-17196
	)	
Plaintiff-Appellant,	)	DC#CV-94-2928-DLJ
	)	Northern California
vs.	)	
	)	
UNITED STATES OF AMERICA	)	**ORDER**
	)	
	)	

Before: FLETCHER, KOZINSKI AND THOMPSON, Circuit judges

The panel has voted to deny appellant Faust's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed, R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

Appendix A-2
Filed Jul 10, 1995
unpublished

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS J. FAUST,	)	No. 94-17196
	)	
Plaintiff-Appellant,	)	DC#CV-94-2928-DLJ
	)	Northern California
vs.	)	
	)	
UNITED STATES OF AMERICA	)	**ORDER**
	)	
	)	

Before: FLETCHER, KOZINSKI AND THOMPSON, Circuit judges

A review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to need further argument. See United States v. Hooten, 695 F. 2d 857 (9th Cir. 1982) (per curiam). Accordingly, we grant appellee's opposed motion for summary affirmance of the district court's November 25, 1994 order denying Faust's petition for a writ of coram nobis.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE D. LOWELL JENSEN JUDGE

THOMAS J. FAUST,	)	
	)	
Plaintiff,	)	DC#CV-94-2928-DLJ
	)	Northern California
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	**ORDER**
	)	
Respondent	)	**FILED-NOV 28, 1994**
	)	

Mr. Faust has filed a second petition for writ of coram nobis, seeking to vacate his conviction for forgery of checks and embezzlement of funds by a jury in district court. This petition comes on the basis of a direct appeal to the Ninth Circuit, numerous notions under 28 U.S.C. §2255 filed before the district court, and an appeal to the Ninth Circuit of the dismissal of a motion under 28 U.S.C. §2255. In November 1993, the district court rejected Faust's first petition for writ of coram nobis for lack of a "cause and prejudice" analysis. Faust filed the current petition on August 19, 1994. Petitioner Faust was represented by Roger S. Hanson at the hearing held on November 1, 1994. Rodolfo Orjales appeared for respondent United States. having considered the submissions, the Court DENIES the petition for a writ of coram nobis.

I. BACKGROUND

On May 28, 1986, Faust was indicted in the Northern District of California. He was charged with three counts of uttering checks in the amounts of $31,369, $100,000, and

$28,348 with forged endorsements, in violation of 18 U.S.C. § 495, and three counts of embezzling the proceeds of the checks, invilation of 18 U.S.C. §641. A jury convicted Faust of the three §496 forgery counts and of one §641 embezzlement cout, and acquitted him of the other two §641 counts.

On direct appeal, the Ninth Circuit reversed Faust's conviction on one §495 forgery count and affirmed the convictions on the remaining two forgery and one embezzlement counts. United States v. Faust, 850 F.2d 575 (9th Cir. 1988).

Faust was sentenced to serve three years probation and to 300 hours of community service, but the government's request for restitution was denied. The government then filed a motion to deny dischargeability in Faust's bankruptcy case for $159,867, the total amount of the three checks. That bankruptcy case is pending.

On April 25, 1989, Faust filed his first §2255 petition for a writ of habeas corpus to set aside the conviction. Faust (1) alleged that the district court had improperly refused to instruct the jury on his defense theories; (2) argued that the government had no ownership interst in the checks and that he had endorsed and chashed; (3) aserted that he government had relied upon perjured testimony and forged documents to secure the convictions; and (4) maintained that he had received ineffective assistance of counsel at trial. After a four-day evidnetiary hearing, on March 29, 1991 the magistrate judge filed a recommendation for disposition rejecting Faust's arguments. Te district court accepted the magistrate judg's finding and dismissed the motion. Faust moved for reconsideration, but the motion was denied on June 29, 1991. Faust then filed a § 2255 petition before the district court judge requesting a hearing. On August 2, 1991, the court denied Faust's petition.

On August 30, 1991, Faust filed a notice of appeal with the Ninth Circuit. On November 6, 1992, the Ninth Circuit affirmed the district court's dismissal of Faust's § 2255 motion. On January 20, 1993, the Ninth Circuit denied Faust's motion for rehearing or for rehearing en banc.

Faust filed his first petition for writ of coram nobis with the district court in September 1993. That petition was denied in November 1993 for lack of a cause and prejudice analysis. Faust has filed the current petition for writ of coram nobis on August 19, 1994.

II. DI8CUSSION

A. Legal Standards

Coram Nobis relief is available to challenge the validity of a conviction, even though the sentence has been fully served . . . 'under circumstances compelling such action to achieve justice.'" Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987) (citing United States v. Morgan, 346 U.S. 502, 503-04, 511 (1954)). The purpose of a writ of coram nobis is to fill "a void in the availability of post-conviction remedies in federal criminal cases" since "a defendant who has served his sentence and been released from custody has no statutory avenue to relief from the lingering collateral consequences of an unconstitutional or unlawful conviction hased on errors of fact" or of law. Yasui v. United States, 772 F.2d 1496, 1498-99 & n.2 (9th Cir. 1985).

District courts have the power to issue a writ of coram nobis under the All Writs Act, 28 U.S.C. § 1651(a), to vacate its judgments for errors of the most fundamental character such that they render the proceeding itself invalid. Id. at 1499; Hirabayashi, 828 F.2d at 604.

A petitioner for coram nobis relief must show that "(l) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." Id. (footnote omitted).

B. Analysis of the Petition

Faust has failed to satisfy the requirements for coram nobis relief. Significantly, Faust has not established the existence of an error of the most fundamental character. See id.

At the core of Faust's petition is the allegation that the trial court erred in giving jury instructions which stated that the payee of a check is the true owner or person to whom the check was payable. This, according to Faust, nullified the need for the factual resolution of the government's ownership of the funds at issue because the Secretary of Transportation appeared on the checks as a joint-payee. Thus, Faust contends that the trial court committed constitutional error because it took from the jury the issue of government ownership, which is an essential element of guilt.

Petitioner Faust contends that the government's ownership of the funds has never been proven and no court has ever ruled on the issue of error in the jury instruction as raised here. However, the record shows that the courts in prior proceedings have concluded that the government had sufficient ownership interest in the funds and have found Faust's assertion of error in the jury instruction meritless.

Specifically, on direct appeal, the Ninth Circuit reviewed the issue of ownership and concluded that the government had ownership interest in the funds and that there was "sufficient evidence to convict" because "Faust without consent usurped the government's control of the proceeds." Faust, 850 F.2d at 57980. On his § 2255 petition, Faust's challenges of the government's ownership were rejected by the magistrate judge, the district court judge, and the Ninth Circuit.

Faust concedes that his arguments regarding error in the jury instruction are not new, but he contends that the magistrate judge, the district court judge, and the Ninth Circuit denied his § 2255 petition without a specific ruling on that issue. However, the courts did rule on the issue. In an unpublished opinion denying Faust's § 2255 petition, Faust v. United States, 1992 U.S. App. LEXIS 29989 *3-7 (9th Cir. November 6, 1992), the Ninth Circuit stated,

> We thoroughly considered on direct appeal most of Faust's arguments, includinq those related to iury instructions on his defense theories and qovernment ownership of the checks. . . . To the extent that any of these repeated arguments are cognizable under § 2255, Faust offers us no reason to believe that the ends of justice would be served by relitigating them. . . . Faust raises several additional challenges, each of which we either have considered before and rejected, or now reject as entirely meritless.

In actuality, Faust faults the courts in prior proceedings for failing to articulate and reject expressly his particular arguments of errors in the jury instructions. However, Faust has not cited a single case that would require a court to furnish a detailed analysis of each point a party makes. And even if the Ninth Circuit's decisions did represent error, this Court is without power to reverse a decision of the Ninth Circuit. United States v. Houser,

804 F.2d 565, 567 (9th Cir.1986).

The government urges the Court to deny Faust's petitionfor lack of jurisdiction to review a decision by the Ninth Circuit because Faust's current petition in effect seeks to have this Court reverse the Ninth Circuit's decision denying Faust's § 2255 petition. The government also contends that the proper remedy for Faust is to appeal from that decision by filing a petition for certiorari to the Supreme Court.

Although the current petition contains no new arguments, the Court declines to base its ruling on jurisdictional grounds. The Court may hear a coram nobis petition to decide whether there are compelling reasons to set aside a conviction to achieve justice. See Hirabayashi, 828 F.2d at 604.

However, where a petitioner, as here, seeks to have this Court declare that the Ninth Circuit is in error, the Court cannot do so. See Houser, 804 F.2d at 567 ("'When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court.'") (citation omitted).

In sum, there are no arguments in the current petition which have not already been considered and rejected by the Ninth Circuit. This Court has no basis for making a ruling that would be inconsistent with the Ninth Circuit's prior decisions.

III. CONCLUSION

For the foregoing reasons, petitioner Faust's petition for a writ of coram nobis is DENIED.

IT IS SO ORDERED.

Dated: November 28, 1994

/S/
D. Lowell Jensen
United States District Judge

APPENDIX C

APPENDIX C-EXCERPTS FROM FAUST'S INITIAL CORAM NOBIS BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. FILED pp 23-34.

ARGUMENT B

THE WRIT OF ERROR CORAM NOBIS SHOULD BE GRANTED BECAUSE THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY CONCERNING PROPERTY RIGHTS OF THE SHIP REPAIRER IS MANDATORY REVERSIBLE SIXTH AMENDMENT ERROR UNDER THE RULES OF SULLIVAN V. LOUISIANA, 113 S.CT. 2078 (1993), CARELLA V. CALIFORNIA, 491 U.S. 263 (1989), SANDSTROM V. MONTANA, 442 U.S. 510 (1979), AND IN RE WINSHIP 397 U.S. 58 (1970).

The trial court instructed the jury *on only one theory*, that theory being the government "owned" the proceeds of the checks. No theory of "government control", or "right to control", of the repair funds was advanced at trial. At trial the court instructed as to the embezzlement charges 2, 4, 6 as follows (RT 5-561):

> **"I will now instruct you on the law of embezzlement, which is to be applied to counts two, four and six of the indictment.**
>
> **Title 18, United States Code Section 641 makes it a federal crime or offense for anyone to embezzle or steal any money or property belonging to the United States having a value of more than one hundred dollars.**

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the money or property described in the indictment belonged to the United States and had a value in excess of one hundred dollars at the time alleged;

Second: That the Defendant embezzled or converted such money or property to his own use or to the use of another; and

Third: That the Defendant did so knowingly and willfully with intent to deprive the owner of the use or benefit of the money or property so taken;

The payee of a check is the true owner or person to whom the check was payable. The term forgery means that the payee's endorsement on a check was written or signed without the payee's permission or authority."

While the three elements of the embezzlement instructions purport to leave, as a factual resolution for the jury, whether the government was the "owner" of the money represented by the three checks, it well appeared that the instructions:

"The payee of a check is the true owner or person to whom the check was payable. The term forgery means that the payee's endorsement on a check was written or signed without the payee's permission or authority..." (RT 5-559)

illegally and erroneously nullified the need for this factual resolution. Simply put, the government never had to prove the key element of its case; that the money belonged to the United States, for the Court simply presumed this as true, absent proof, and instructed the jury on such an erroneous assumption. Thus the entire trial was conducted as to "embezzlement" and "forgery"on the theory that the government was the true owner of the proceeds of the checks, and not on any theory that the government could "control the proceeds". No such jury instruction was proffered. In fact the Inspector Generals office gathered evidence from MARAD that said that "NONE" of the checks were to be sent to the government, or physically endorsed by MARAD, all were to be sent to the "ASSURED" of which the government was not. Petitioners E.R. Item # 7 pp.143 (Evidentiary Ex #6B). Sullivan v. Louisiana, 113 S.Ct. 2078, 2081-83, 1214 L.Ed.2d, 182 (1993). "**It does not fulfill Sixth Amendment requirements to have judges hypothesize that a guilty verdict would have been rendered no matter how overwhelming the evidence of guilt might be**. Id. at 2081-83.

This instruction is plain error in fact and law. The United States of America is not, and never could be, the "owner" of the proceeds of the three checks because the insurance checks were issued as co-payee checks for reimbursement to the party that paid for the restoration of ZP Chandon. This party was Faustug who fronted the $247,000+ in funds to Valley Shipyard for most of the repairs in Brownsville, Texas. Faustug also subcontracted with Bender in Mobile, Alabama for the rest of the repairs.

United States v. Hartec Enterprises and Jose Aceves, 967 F.2d 130 (5th Cir. 1992) called the Faust criminal conviction "plainly wrong". This panel of judges decided that the government had only an unsecured lien interest pursuant to Marine Midland Bank v. United States, 231 Ct. Cl. 496, 687 F.2d 395 (1982) cert denied 460 U.S. 1037, 103 S.Ct. 1427, 75 L.Ed. 2d 788 (1983)

United States v. Lawson, 925 F.2d 1207 (9th Cir. 1991), (Judges Poole, Hall, Thompson) declined to apply U.S. v. Faust supra. and instead followed United States v. Johnson, 269 U.S. 220, 45 S.Ct. 496 (1925) holding that the government can not prosecute a government contractor for embezzlement if they have a debtor creditor relationship with the government. The case specifically holds that the U.C.C. must be followed in Debtor creditor relationships See United States v.Kimbell Foods, 440 U.S. 715. As proven, by contract law, and U.C.C. lien law, the government has no legal property or security interest in any of the reimbursement checks. In Lawson, supra, the court determined that although the government lost its financial proceeds, there was no criminality because the contract failed to say that the proceeds belonged to the government. In contrast to the facts of Lawson, where the money was lost, at bar the government never lost any money, and in fact has been overly reimbursed even though they never contributed a cent to the repairs. The facts shown in E.R. pp.135) stated that the insurance binder issued insurance was bound for:

"Faustug Marine Corporation(assured) and
Tractug Associates (assured), and
United States of America
As their interests shall herein or hereafter appear"
with
Loss payable, if any, payable to the assured, or
United States of America". *Emphasis added*

The integrated contract clauses state under the legal and mandatory language SHALL:

> "If the shipowner shall have incurred the loss, damage or expense in question, any such loss **shall be paid** to the shipowner in reimbursement if there is no existing default on which the underwriter has written notice from the shipowner or the Secretary."
> Evidentiary Exhibit #4-c

.. "It is not intended that the Mortgage include any property other than the vessels"...
Tractug Mortgage ER . 167)

> TITLE TO AND POSSESSION OF THE VESSELS
> (1) the foregoing Secretary's rights under Section 2.04 (a) **shall not apply**
> **(d) To liens for repairs or with respect to any changes made in the Vessel pursuant to paragraph (i) of this Section .** CR 193
> and
>
> Clause 12(b) 4 This clause waived the requirement **for dual signatures on all negotiable instruments acquired in the ordinary course of business** (Marad Security Agreement General Provisions, Section 12, financial Requirements of the company, page 16-17)

Although not required, and in violation of the contract between the U.S. Maritime Administration and petitioner, each check was issued as a co-payee check to the Secretary of Transportation and Petitioner's corporation, although, as testified by a government witness, the government refuses to sign co-payee checks (RT 2-184) No court has distinguished the evidentiary hearing evidence and facts before the court against the holdings of United States v. Lawson, supra

The repairs being done by Valley Shipbuilding and Faustug, and paid from a wire transfer of funds to Valley, Evidentiary Exhibit #33, and a documentation of the repairs, Evidentiary Exhibit #1, these parties sustaining the loss, the loss was then payable to the Assured, and not to the United States.

THE NEW NINTH CIRCUIT STANDARD IS U.S. V. GAUDIN

An en Banc panel of the Ninth Circuit on June 1994 redetermined that U.S. v. Gaudin, 28 F.3d 943 (9th Cir. 1994) would control on the law on jury instructions. Citing from Gaudin at 945:

In the oft-quoted opinion of In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed. 2d 368 (1970) the Supreme Court stated:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof [to a proper factfinder] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

With the quoted summary in the recent Sullivan case, it is clear that the jury must decide "the facts necessary to establish each [element of the crime]." As Justice Scalia has noted in his concurrence in Carella, the jury's fact-finding function is a structural matter that the Constitution guarantees.

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. This is why the Court has found it constitutionally impermissible for a Judge to direct a verdict for the State. Carella, 491 U.S. at 268, 109 S.Ct. at 2421 (citations omitted).

U.S. v. Gaudin, 28 F.3d 943 (9th Cir. 1994)

The government must prove each of these elements separately, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970).

The court then instructed that the "owner" of the funds was the "payee" of the check, which was erroneous in fact and as a matter of law under the facts of this case; moreover this instruction went further than the conclusive presumptions found condemnable in Sandstrom v. Montana, 442 U.S. 519, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979), in that it circumvented the obligation of the government to prove "ownership" in the government and obviated the need to prove that the

funds "belonged to" the United States, and amounted to a directed finding the government "owned" these insurance reimbursement funds when in fact, they properly were "owned by" and "belonged to" those who advanced the funds to repair and restore ZP Chandon, here Faustug/Tractug.

This error in jury instructions requires reversal of the remaining embezzlement Count 2 for a separate and independent reason besides the collateral estoppel principle of Ashe v. Swenson, 397 U.S. 117, 90 S. Ct. 1189 (1970).

The error in instructing the jury on the requisite intent necessary to convict a defendant of embezzlement required depriving the owner of the benefit of the money or property. When coupled with the directed instructions on government ownership, of the proceeds of the money due the payee of the check, it is a fundamental violation of the due process clause of the Fifth Amendment. The United States Supreme Court in In re Winship, 397 U.S. 358, 364 (1970) so held:

[The] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

See also Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed. 344 (1985); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d (1979). The U.S. Ninth Circuit Court has recognized that defective jury instruction violates Winship's mandate "by effectively allowing the government to presume the element of intent." Martinez v. Borg , 937 F.2d 422 (9th Cir. 1991). Moreover, the right to have the jury determine each element of the

offense is absolute, and the trial court's failure to so instruct is "the functional equivalent of a directed verdict" on the issue "of intent to deprive the owner". Connecticut v. Johnson, 460 U.S. 73, 84 (1983).

The jury instructions, as given to the jury in Mr. Faust's case, directed the jury to consider that the Payee was the owner of the check[1] The error stems from the subsequent erroneous instruction that the government as the payee of the check was the owner of the money. This clearly violates the mandate of In re Winship, as it relieved the prosecution of its burden of proving each element-- in this case the elements of ownership and specific intent -- of the crime.

1. THE ERROR WAS PREJUDICIAL.

It is manifest that no "harmless error" analysis can be here applied, for the assailed instruction forced the jury to find that the government owned the money, or alternatively, the money "belonged to" the government, and secondly that the appellant had "the intent to deprive the owner" of the funds taken; obviously if the government did not "own" the money, establishment of a specific intent to embezzle government funds would be impossible.

Examination of the analysis of "harmless error" in Carella v. California, 491 U.S. 263 (1989) is illuminating. In Carella v. California, supra, Justice Scalia, in his concurring opinion, carefully limited the scope of the

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[1] The government supported its claim by submitting a government altered/forged document which falsely portrayed Petitioner's ownership position by an error of 3650% The 9th Cir Panel of Canby, Alarcon and Sneed hypothesized the government document forgery, supported by perjured government witness testimony as "harmless error".

harmless error standard. He explained that a defective jury instruction that creates a conclusive presumption of intent or that removes the issue of intent from the jury "invades[s] [the] fact-finding function' which in a criminal case the law assigns solely to the jury." Id. at 2422, quoting United States Gypsum Co., 438 U.S. 422, 446 (1978).

In his concurring opinion in Carella, Justice Scalia emphasized the historical significance of the "structural guarantee" that a jury decide the facts of a criminal case without any involvement by the judge:

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20 L.Ed. 2d 491 (1968). It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Id. at 156, 88 S.Ct. at 1451. A defendant may assuredly insist upon the observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the state. Carella, supra

Thus, in Justice Scalia's view (Id.) the inquiry is not necessarily whether the trial record as a whole overwhelmingly establishes guilt beyond a reasonable doubt:

> 'The question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards

appropriate for criminal trials." [Citations] **"Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime."** Cabana v. Bullock, 474 U.S. 376, 384-6.

6. Under the Federal Cost Accounting Standards Board standards, a debt setoff on account of an accident is forbidden by 48 CFR 9904.416-50.[2] Under 48 CFR 9904.416-50 Techniques For Application (a) Measurement Of Projected Average Loss, Section (3) in measuring actual loses under subparagraph (a)(2) of this subsection:

(i) the amount of a loss **SHALL** be measured by: (A) the actual CASH value of property destroyed,

(B) amounts paid or accrued to repair damage, (C) **amounts paid or accrued to estates and beneficiaries, and** (D) amounts paid or accrued to compensate claimants, **including subrogation**.

7. To the best of my knowledge and belief the repair analysis prepared by Leroy Hamilton VP Finance at Valley Shipbuilding was accurate based on the audit of the books and records of Tractug Associates as of December 31, 1983 and for the period then ending concluding that Tractug has been under paid $87,133; the government has been overpaid **$177,973** :

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[2]See Code of Federal Regulations Title 48--Federal Acquisition Regulation System Chapter 99--Cost Accounting Standards Board, Office of Federal Procurement, Policy, Office of Management and Budget, Subchapter A--Administration, Subchapter B--Procurement Practices and Cost Accounting Standards, Part 9904--Cost Accounting Standards.

ZP CHANDON ACCIDENT RECONCILIATION ACCOUNT ANALYSIS

	Tractug Account		Marad's Account	
	DEBIT	CREDIT	DEBIT	CREDIT
1. Accident costs/ repair expenses incurred by Valley Shipbuilding and Faustug		$247,000+		
2. Reimbursement of Costs and Expenses Insurance Check 3/8/83	$100,000			
3. Reimbursement of Costs and Expenses Insurance Check of 8/12/83	31,469			
4. Reimbursement of Costs and Expenses Insurance Check 9/83	28,398			
5. Parts Borrowed from Valley Shipbuilding			$-0-[3]	
6. Reimbursement of Costs and Expenses insurance check of 8/85				74,137.
7. MARAD recovery of proceeds from MOAC Wells Fargo, Bank of America 10/87				103,836.
	$247,000	$159,867	$-0-	$177,973
Underpayment–		87,133	$177,973	overpaid
	$247,000	$247,000	$177,973	$177,973

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3 Note GAAP fair value of parts is established at 1983 time of repairs/accounting, not in some future time period. The Govt has an unpaid hypothetical 87 1/2% unperfected lien on $49,000 of Owner (Tractug) supplied parts which **as soon as the government pays $2,900,000 claim to debtor, the Govt. will then have a hypothetical lien. In 48 C.F.R. 32.501** under a **progress payments liquidation** the govt recognizes less than 80% of cost as loss or $39,200 (.8% v $49,000= $39,200) hypothetical lien loss.

8. According to my knowledge of General Accepted Accounting Procedures, GAAP, any insurance indemnification claims reduced to cash shall be accounted for as an offset to losses paid in accordance with existing practices.

12. To conclude, in application of Generally Accepted Accounting Procedures (GAAP) the government has not sustained any loss due to any use of Valley Shipbuilding vessel parts to effect repairs of ZP Chandon. There was no theft or embezzlement or loss of any government property. The government has instead been overcompensated by receipt of cash equivalent amounts of $177,836.

13. In addition, as I understand the contract clauses, there was no attempt to defraud, as the government contract between MARAD and Tractug specifically provides that no government signature is required on reimbursements received in "the normal course of business"(Clause 12-b-4). Clause 12-B-4 specifically relinquishes any government rights to control over reimbursements. A reimbursement check sent by the insurance company to the assured as payee is in the normal course of business. See also Petitioners **Excerpts of Records** for full text of Dudly Syler CPA exhibits pp. 72-112.

The date of the transaction (creation of insurance company liability to reimburse for repairs made) is January 21, 1983, and at that time no default existed. MARAD, by its contract language, which it drafted, intended that there was to be no offset used to reduce the cost of the vessel. Therefore, Appellant's contract rights mandates a reexamination of the instructions not

given. **Specifically the government can not prosecute Plaintiff using unorthodox accounting techniques.** The government must follow all applicable government accounting regulations in 48 CFR. 9904.416-15; Federal Acquisition Regulations, FAR-31; Federal Acquisition Regulation, FAR ¶ 30,605.04 31-201-3. For excerpts of these regulations see Excerpts of Record.

See also The City of Norwich, 118 U.S. 468 (1886), City of Athens (sub nom) Archawaki et al., v. Hanoti et al 350 U.S. 532; 76 S.Ct. 617 (1956), Gayle Mfg Co v. Federal Sav. & Loan Ins. 910 F.2d 974 (9th Cir. 1990) for a case upholding lien work done (finding no government interest). The Ninth Circuit has even ruled against a government "constructive trust" theory advanced by the government that they had property rights in United States v. Hilling, 863 F.2d 677 (9th Cir. 1988). See also United States v. Parcel of Land, 113 S.Ct. 1126, 112 L.Ed. 2d 462 (1993) for proposition of innocent property rights can not be seized by government. See Harry Graham evidence E R. pp. 123.

THE TRIAL COURT 'S "STRUCTURAL ERROR" INSTRUCTIONS MANDATED AN ILLEGAL CONVICTION

The United States government may not be presumed to have an ownership interest in the proceeds of a check merely because the government is named as a copayee on the check.

A defective reasonable doubt instruction creates a structural error that is not subject to harmless error analysis, because the Sixth Amendment right to have a jury resolve all issues of guilt is

> a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose v. Clark*, 478 U.S. 570, 577 (1986). The right to trial by jury reflects, as we have said, "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana* 391 U.S. at 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."
> Sullivan, 113 S. Ct. at 2083.

The payee of a check is not the owner of a check. "Instruments made payable to two or more payees or indorsee gives rise to two distinct kinds of questions. The first has to do with the manner in which an instrument may be negotiated, enforced or discharged. The second goes to questions as to the relative rights of ownership of the payee or endorsee. UCC Section §3-116 is concerned with the first category and not the second. The relative rights of the parties inter se are determined by their own understanding...the fact that an instrument is payable jointly does not imply any joint ownership rights such as a right of survivorship". Hawkland & Lawrence, UCC Series Sec §3-116:01 (1994). See. Hattaway v. Keefe, 10 UCC Rep Serv 2d 143, 191 Ga App 315, 381 SE 2d 569 (1989) (ownership of proceeds not governed by payee status).

There are numerous cases which have held that mere status as a copayee of a check is insufficient to confer rights to the proceeds of a check. The specific ownership interest that a copayee has in the proceeds of a check is determined by state law. Hall v. Mid-Century Inc. Co., 811 P 2d 855 (Kans. 1991) Midwest Industrial Funding v. First National Bank, 973 F.2d 534 (7th Cir. 1992) (Although plaintiff Midwest was a copayee on the

checks, "Midwest has not explained why it should be allowed to recover on the checks in view of the notification agreement".) The California law that governs in this case provides that a copayee entitlement to proceeds of a check is "limited to the amount that he should have received thereon". The amount that a copayee should have received is determined "in accordance with the drawer's intent". Southern California Permanente Medical Group v. Bozinovski, 196 Cal Rptr 150 at 153, 155 (1983).

If a check is made out to two payees, what does the jury instruction "that a payee of the check is the true owner mean"? Should each copayee be entitled to half of the proceeds? Johnson v. Cox, 33 UCC Rep Serv 988, 630 SW 2d 492 (Tex App 1982). A payee or co payee is only entitled to the underlying property interest that the payee has in the check. The conviction of Mr. Faust must be overturned as the jury was not instructed that the government's ownership interest was dependent upon the government's underlying rights, if any, to the proceeds of the check.

The government by contract gave all rights to Faust to induce him to quickly repair the vessel. The government spent not one cent to repair the vessel. Pursuant to the law of In re Softtalk Publishing Co, 856 F.2d 1328, 1330 (9th Cir. 1988) the government had no perfected security interest in any of the three checks. The remaining convictions are pure error and must be reversed under controlling Ninth Circuit law. See United States v. Seaman, 18 F.3d 649 (9th Cir. 1994). Under the Seaman standard the government must first prove to the jury a minimum of $100 property interest under §641. Under §496 the government has to prove intent to defraud. According to Sylers Declaration, the government never had any property interest or contract control over the reimbursement checks.

Appendix D-

EXCERPTS FROM PETITIONER'S INITIAL HABEAS CORPIS BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VI. LEGAL ARGUMENT
A

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY CONCERNING PROPERTY RIGHTS OF THE SHIP REPAIRER CONSTITUTES PREJUDICIAL ERROR UNDER THE RULES OF CARELLA V. CALIFORNIA, 491U.S. 263 (1989), SANDSTROM V. MONTANA, 442U.S. 510 (1979), AND IN RE WINSHIP 397 U.S. 58 (1970).

The trial court instructed the jury on only one theory, that theory being the government "owned" the proceeds of the checks. No theory of "government control" of the repair funds was advanced at trial. At trial the court instructed as to the embezzlement charges 2, 4, 6 as follows (RT 5-561):

> I will now instruct you on the law of embezzlement, which is to be applied to counts two, four and six of the indictment.
>
> Title 18, United States Code Section 641 makes it a federal crime or offense for anyone to embezzle or steal any money or property belonging to the United States having a value of more than one hundred dollars.
>
> The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

- First: That the money or property described in the indictment belonged to the United States and had a value in excess of one hundred dollars at the time alleged;

- Second: That the Defendant embezzled or converted such money or property to his own use or to the use of another; and

- Third: That the Defendant did so knowingly and willfully with intent to deprive the owner of the use or benefit of the money or property so taken;

The payee of a check is the **true owner or person to whom the check was payable.** The term forgery means that the **payee's endorsement on a check was written or signed without the payee's permission or authority**."

While the three elements of the embezzlement instructions purport to leave, as a factual resolution for the jury, whether the government was the "owner" of the money represented by the three checks, it well appeared that the instructions:

> "The payee of a check is the **true owner or person to whom the check was payable**. The term **forgery means that the payee's endorsement on a check was written or signed without the payee's permission or authority**.." (RT5-559)

illegally and erroneously nullified the need for this factual resolution. Simply put, the government never had to prove its case: that the money belonged to the United States, for the Court simply presumed this as true, absent proof, and instructed the jury on such an erroneous assumption.

This instruction is plain error in fact and law. The United States of America is not, and never could be, the "owner" of the proceeds of the three checks because the insurance checks were issued as co-payee checks for reimbursement to the party that paid for the restoration of ZP Chandon, and this was Faustug who fronted the $247,000 in funds to Valley Shipyard for most of the repairs in Brownsville, Texas and who also had subcontracted with Bender in Mobile, Alabama for the rest of the repairs; and the insurance binder (Evidentiary Hearing Exhibit # 46) stated that insurance was bound for:

> "Faustug Marine Corporation and Tractug Associates, and
> United States of America,
> as their interests shall herein **or** hereafter appear"
> with
> "loss payable, if any payable to the **assured,** or United States of America" (emphasis supplied)

The repairs being done by Valley Shipbuilding and Faustug, and paid from a wire transfer of funds to Valley, Evidentiary Exhibit #33, and a documentation of the repairs Evidentiary Exhibit #1, these parties sustaining the loss, the loss was then payable to the Assured, and not to the United States.

The government must prove each of these elements separately, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970).

The court then instructed that the "owner" of the funds was the "payee" of the check, which was erroneous as a matter of fact and as a matter of law under the facts of this case; moreover this instruction went further than the conclusive presumptions found condemnable in Sandstrom v. Montana, 442 U.S. 519, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979), in that it circumvented the obligation of the

government to prove "ownership" in the government and obviated the need to prove that the funds "belonged to" the United States, and amounted to a directed finding the government "owned" these insurance reimbursement funds when in fact, they properly were "owned by" and "belonged to" those who advanced the funds to repair and restore ZP Chandon, here Faustug/Tractug.

This error in jury instructions requires reversal of the remaining embezzlement Count 2 for a separate and independent reason in addition to the collateral estoppel principle of Ashe v. Swenson, 397 U.S. 117, 90 S. Ct. 1189 (1970).

The failure to instruct the jury on the requisite intent necessary to convict a defendant of embezzlement is a fundamental violation of the due process clause of the Fifth Amendment. The United States Supreme Court in In re Winship, 397 U.S. 358, 364 (1970) so held:

[The] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

See also Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed. 344 (1985); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d (1979). This Court has recognized that defective jury instruction violates Winship's mandate "by effectively allowing the government to presume the element of intent." Martinez v. Borg , 937 F.2d 422 (9th Cir. 1991). Moreover, the right to have the jury determine each element of the offense is absolute, and the trial court's failure to so instruct is "the functional equivalent of a directed verdict" on the issue "of intent to deprive the owner". Connecticut v. Johnson, 460 U.S. 73, 84 (1983).

The jury instructions, as given to the jury in Mr. Faust's case, directed the jury to convict Mr. Faust as having personal gain and benefiting from the transaction without finding that he held the requisite specific intent to steal from the government. This clearly violates the mandate of In re Winship, as it relieved the prosecution of its burden of proving each element-- in this case the elements of ownership and specific intent -- of the crime.

1. The Error Was Prejudicial.

It is manifest that no "harmless error" analysis can be here applied, for the assailed instruction forced the jury to find that the government owned the money, or alternatively the money "belonged to" the government, and secondly that the appellant had "the intent to deprive the owner" of the funds taken; obviously if the government did not "own" the money, establishment of a specific intent to embezzle government funds would be impossible.

Examination of the analysis of "harmless error" in Carella v. California,491 U.S. 263 (1989) is illuminating. In Carella v. California, supra, Justice Scalia, in his concurring opinion, carefully limited the scope of the harmless error standard. He explained that a defective jury instruction that creates a conclusive presumption of intent or that removes the issue of intent from the jury "invades[s] [the] fact-finding function' which in a criminal case the law assigns solely to the jury." Id. at 2422, quoting United States Gypsum Co., 438 U.S. 422, 446 (1978). To this effect, Justice Scalia stated:

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20 L.Ed. 2d 491 (1968). It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Id. at 156, 88 S.Ct. at 1451. A defendant may assuredly insist upon the observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the state. Carella, supra

Thus, in Justice Scalia's view (Id.) the inquiry is not necessarily whether the trial record as a whole overwhelmingly establishes guilt beyond a reasonable doubt:

> 'The question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." [Citations] "Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." Cabana v. Bullock, 474 U.S. 376, 384-385, 106 S.Ct. 689, 696, 88 L.Ed. 2d 704 (1986).

. . . For nothing in the instruction would have directed the jury, or even permitted it, to consider and apply that evidence in reaching its verdict. And the problem would not be cured by an appellate court's determination that the record evidence unmistakenly establishes guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, "the error in such a case is that the wrong entity judged the defendant guilty." Rose v. Clark, supra 478 U.S. 570, 578 (1986). (emphasis in original). Carella, supra

This rationale applies with equal force not only to cases where the jury is instructed to presume an element of the crime, but also to cases as here, where instruction "misdescribes" an element of the offense. Id. at 2423, citing Pope v. Illinois, 481 U.S. 497 (1987). See also Martinez v. Borg, 937 F.2d 422 (9th Cir. 1991)

Obviously nothing in this trial established that the United States "owned" the proceeds of the three checks, nor that the money somehow "belonged to", the United States, and thus the aberrant jury instruction was egregious not only for carrying the burden on the absent evidence, but, indeed, erroneously so doing since the government could never "own" these funds. Clearly the "harmless error" reasoning of Carella, supra, thus requires reversal.

2. The jury was never instructed to consider that petitioner was legally entitled by contract to do as he did.

The Court instructions to the jury were,

" To constitute the crime charged in the indictment there must be the joint operation of two essential elements and act forbidden by law and an intent to do the act. (RT 5-558)

However, the jury was never instructed to consider that petitioner was legally entitled to do as he did. The court gave no specific instructions on petitioner's legal theory that under California contract law, California insurance Law, California Commercial Code, and Uniform Commercial Code, he was following the law and the MARAD Security Agreement contract. In the crime of forgery, the focus is on the mens rea of the signatory at time of signing. In crime of embezzlement, focus is on the mens rea of the person accused of embezzlement. Petitioner had a valid contract which allowed him to seek "direct reimbursements". Therefore Petitioner had no mens rea to commit any crime.

Appellant's contract rights mandates a reexamination of the instructions not given. The facts of the case, and uncontroverted testimony offered on RT 4-407 lines 20-25 to RT 4-408 line 1, justified the giving of these additional offered instructions:

INSTRUCTION NO. 75

The insurance loss payee clause is non-applicable when the ship owner authorizes a repairer to complete repairs and the repairer completes the repairs. The rights of the party completing the repairs (Valley Shipbuilding) supersede any rights which the Maritime Administration may have to the prejudice of the unpaid repairer, Valley Shipbuilding who had effected the repairs in reliance upon the assignment of the insurance proceeds. Reliable Marine Boiler Repair v. Frank B. Hall Insurance Co. 1971 AMC 1941), 325 F. Supp 58. (1971)

3. CONTRACTUAL DEFENSE

Over Appellant's objections, this instruction was not given; MARAD's contract authorized Appellant to have direct loss payment of insurance checks. As a shiprepairer "shipyard" there was no limit on any of the checks. Only as a shipowner was there a restriction. Each check made out to a shipowner could not exceed $100,000 and cumulative dollar amounts up to $200,000 because there were two events, plus unlimited P&I claims. Petitioner was lawfully entitled to be reimbursed fully for cash expenses he contributed to making the repairs. Indeed the name of his company was written on the checks as the number one preferred payee Petitioner lacked predisposition to engage in any criminal conduct. (See declaration of Gerald Neumann attached as Exhibit # 5, CR 132) Petitioner also denied guilt. Other jury instructions sought by petitioner and rejected by the trial court were the following:

INSTRUCTION 65

> An insurer cannot unilaterally write an insurance policy which conflicts with the provisions of the Security Agreement. An insurance policy written unilaterally by the insurer is void unless it is consistent with the purpose of the Security Agreement. "MARAD/Tractug Associates Security Agreement" dated October 8, 1980, Exhibit 1, Article 1, Section 2.07; Article 8, Section (h) (3)

and for a Sandstrom analysis on the requisite mens rea

INSTRUCTION NO. 69

The honest exercise of official discretion in good faith, without fraud, for the advantage, of the association does not establish intent to defraud.United States v. Fish, 24 F 585, 588 (C.C. S.D. N.Y. 1885); United States v. Adamson, 665 F.2d 649 (1982)

INSTRUCTION NO. 70

A non-signing co-payee whose name has been endorsed by the other co-payee has not been damaged where the proceeds of the check were first received and retained by the non-signing co-payee. And because the non-signing co-payee's security interest in the tugboat was protected by making the tug operational as soon as possible. Transamerica Steel v. Federal Ins., 535 F. Supp. 1185 (N.D. Ga 1982) Arlington Trust Co. v. Montgomery Banking & Trust 278 F. Supp. 106 (E.D. Va. 1968)

INSTRUCTION NO. 72

Where a person receives funds to reimburse, indemnify, or compensate for previous expenditures such as advance of money or property and is merely reimbursing for prior expenditures, there can be no embezzlement or the taking of money or property. Arlington Trust Co. v. Montgomery Banking & Trust, 278 F. Supp. 106 (E.D. Va 1968)

Without a correct instruction given to define that intent, there is no manner in which to determine whether this jury found the correct intent.

On these facts, the conviction cannot stand, particularly in light of the telling fact of Mr. Faust's two acquittals on the embezzlements of checks two and three. Because the jury specifically found that Mr. Faust was innocent of any embezzlement on checks two and three, the jury's rejection of the intent logically assumes that the jury rejected the notion that Mr. Faust forged and embezzled the checks. Clearly, the jury was confused, as it convicted Mr. Faust of the forgery and embezzlement of check one, yet acquitted on checks two and three.

This scenario falls squarely within the caveat offered by Justice Scalia in Carella v. California:

> If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to preform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are made. Carella v. California, 109 S.Ct. at 2423, quoting Connecticut v. Johnson, supra, 460 U.S. at 85-86.

Where the trial court inaccurately defines the necessary intent, and where the other instructions only served to amplify the confusion created by the defective instruction, the adjudication of appellant's guilt is fundamentally flawed. Here the error cannot be dismissed as harmless, as such a result gives "too little weight to the method by which decisions of guilt are made." Id.

4. The Trial Court Is Collaterally Estopped From Duplicating Charges Of Intent From Forgery To Embezzlement.

A common and single intent would govern the "embezzlement" and the "forgery" charges; similarly, the funds were either "owned by" or were not, or "belonged to" the United States, or they did not; similar legal principles govern all elements of the corpus delicti of Counts 1,3, and 5 and Counts 2, 4, and 6.

Under the principle of collateral estoppel of Ashe v. Swenson , 397 U.S.117, 90 S.Ct. 1189 (1970), acquittals of Counts 4 and 6 would require an acquittal of Count 2 under the facts of this case; reversals by the Ninth Circuit of Count 1 requires reversal of the convictions under Counts 3 &5.

The crimes of "embezzlement " and "forgery" are here inextricably intertwined and each require the intent to steal from the United States of America. Duplicate charges of the same intent is forbidden by Bell v. United States, 349U.S. 963, 75 S.Ct. 620, 621-623 (1955) which forbids fragmentation of issues. Therefore the six separate indictments which resulted in three separate convictions were inappropriate on the ground that all three checks (shown on the following illustration) were issued as progress payments "ON ACCOUNT" on a reimbursement for a single accident which happened January 20, 1983, to the same tug, from the same insurance company, on the same "grounding" claim and the same insurance policy to the same number one payee Faustug Marine Corp.

BEST AVAILABLE COPY

Proof of Fragmentation

Check one was issued as **"on account"** indicating several additional checks would be forthcoming on the:

- **same** tug, from the same insurance company
- **same** "grounding" claim and the
- **same** insurance policy to the
- **same** assured, payee Faustug Marine Corp.



The rule against multiciplicty prohibits the charging of a single offense into several counts and is intended to prevent multiple punishment for the same act.

The intent of the petitioner was to obtain reimbursement of monies advanced in January of 1983 from Faustug/Tractug to Valley Shipbuilding, Brownsville, Texas to repair and restore ZP Chandon. Petitioner did not have the specific intent to steal from the United States nor could he have stolen from the United States since the United States never "owned" the reimbursement funds nor did the reimbursement funds "belong to" the United States and the single intent must permeate all counts in the indictment.

The possibility that the result in this case would have been different had the jury been instructed correctly on ownership, admiralty and property rights is very high as proven by the split jury decision. The remaining convictions must be reversed.

Appendix E-

PETITIONERS ENTITLEMENT TO CORAM NOBIS RELIEF ANALYSIS AS WAS SUBMITTED TO UNITED STATES COURT OF APPEALS, NINTH CIRCUIT IN OPENING MEMORANDUM

To qualify for coram nobis relief, the petitioner must demonstrate each of the following four factors:

> "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character."

Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987)

In Hirabayashi, supra, the court applied the clearly erroneous standard to a district court's factual finding in coram nobis proceeding. In a parallel content, the Ninth Circuit has held that the district court's dismissal of a §2255 petition is reviewed de novo. See Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991).

A. A MORE USUAL REMEDY IS NOT AVAILABLE

Petitioner has appealed his case, and served his sentence. Petitioner is not under any government supervision, thus is not eligible to pursue an appeal under §2255.

B. VALID REASON FOR NOT ATTACKING THE CONVICTION EARLIER

The attorney who handled the direct appeal, **Doron Weinberg,** did not raise any of the constitutional issues raised herein on direct appeal. Petitioners' direct appeal counsel told petitioner that there were about 12 or more errors in the trial. In the fifty pages allocated on direct appeal, he selected other issues, i.e. mail fraud as considered under McNalley v. United States, 107 S.Ct. 2875 (1987) and neglected to raise any of the constitutional errors contained in this writ of coram nobis.

Petitioners' counsel was busy and used an outside contract summary and condensation service to condense the six books of trial transcripts. The outside summary service erred in condensing the trial transcripts, thus Petitioner's counsel missed the main and most important constitutional issues which are now being raised in this brief. Because of direct appeal attorney **Weinberg's** "human error", an omission of this issue of Sandstrom-Carella caused on direct appeal, none of these constitutional errors were ever reviewed on direct appeal or on habeas review. See attached Weinberg Declaration

See Hanson declarations on the Coram Nobus petition herewith attached, which sets forth major constitutional error caused by appellant's direct appeal attorney **Weinberg.**[1] Failure to raise this error at trial was a result of deficient performance on the part of attorney Martin Schainbaum and caused prejudice to appellant and failure to raise this issue on direct appeal

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[1] Mr. Weinberg's declaration admits to failure to raising this issue on appeal and recognizes that no court has resolved this error.

was the result of deficient performance of appellant attorney Doron Weinberg and caused prejudice to appellant. Ineffective assistance of counsel violates the sixth amendment right to counsel, and thus can require reversal of a conviction. Strickland v. Washington, 446 U.S. 668 (1984) As Carrier makes clear, "such a conviction cannot stand." Morris, id 453, cert denied 113 S.Ct. 96 (1992).

A right, whether derived from the constitution of the United States or federal statute, rule, or policy, will be tainted by ineffective representation. If so tainted, then it is as though the right were never provided to a defendant. Put another way, there can be no Sixth Amendment right to a fair trial if ineffective assistance of counsel prevented appellant Faust from making a claim that otherwise would have been available; the failure of the constitutional right to effective representation thus infects the entire direct appeal.

Since the Sixth Amendment right means nothing if provision for incompetent counsel satisfies it, a procedural default is chargeable to a defendant only if he was represented by a lawyer who was competent under the standards of competence of the sixth amendment. Conversely, no default is chargeable to a defendant if the lawyer failing procedurally was ineffective under the sixth amendment. Kimmelman v. Morrison (1986) 477 U.S. 365, 91 L.Ed. 2d 305, 106 S.Ct. 2574.

CAUSE AND PREJUDICE THE STANDARD FOR FAILURE TO RAISE ISSUES AT TRIAL OR ON DIRECT APPEAL

Neither the Government nor the District Court disputed the Cause and Prejudice arguments presented in Petitioners brief filed in the lower court. Thus they have defaulted any argument on appeal. A full cause

and prejudice argument presented to the lower court is shown in Exhibit #D.

Recent Ninth circuit ruling such as Brown v. Maass, 11 F.3d. 914 (9th Cir, 1993) upholds the principle that the government waives any procedural default when they fail to contest it in prior proceedings or the district court fails to examine the issues before it.

C. ADVERSE CONSEQUENCES

Citing Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968), Hirabayashi v United States, 828 F.2d 591 (9th Cir. 1987) held that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. 828 F.2d at 606. "We have repeatedly reaffirmed the presumption that collateral consequences flow from any criminal conviction," and the government carries the burden of disproving this presumption. United States v. Walgren, 885 F.2d 1417, 1421 (9th Cir. 1989). See Miller v. Washington State Bar Ass'n, 679 F.2d 1313, 1318 (9th Cir. 1982) (letter of admonition in attorney's permanent record for which he is professionally accountable constitutes sufficient adverse consequences for Article III. Petitioner has over one million dollars in liability all attributable to the erroneous decisions previously reached in this district court.

a) In Re Thomas J. Faust, 3-85-01860 TC. In 1993-94, the government is pursuing a 11 U.S.C. §523(a) motion to deny dischargeability of $159,818.22 on the basis of this criminal conviction of petitioner endorsing a copayee check authorized for his signature and that of the government's designee. Petitioner is threatened by a

"taking" , which is forbidden by the Fifth Amendment of the Constitution. See. Excerpt of Record Item #5 pp.113.

b) Faust v. United States, 88-0893 MHP (WB). In 1991-2, the government invoked Federal Rule of Evidence Rule 609 to impeach plaintiff and all of his supporting witnesses by introducing evidence of Faust's conviction so the government was automatically able to secure a $350,000 Valley Shipyard payroll tax judgment plus $550,000 in interest against petitioner. This unlawful conviction has caused a $1 million liability to be permanently placed on Petitioner. Petitioner is continuing being denied the right to fair, impartial, and unbiased trials, and remains economically bankrupted and destroyed.

More fundamentally, however, it cannot be said that the existence of an additional felony conviction, even if it does not affect a defendant's criminal history category, will have no possible adverse consequence in the sentencing judge's sentence within the guideline range or "3-strikes" provisions. More than a possibility exists that the existence of an additional felony conviction will militate toward a sentence at the higher end of the guideline range, see 18 U.S.C. §3553(c)(1) (court must state its reasons "for imposing a sentence at a particular point within the [guideline range].) Thus the possibility exists that Faust might suffer an adverse consequence if his remaining embezzlement and forgery conviction are left standing.

Further, Faust will continue to be impeached should he ever testify in court because the embezzlement and forgery conviction are based on a scheme to defraud. Hirabayashi v. United States, 627 F. Supp. 1445, 1455 (W.D. Wash. 1986), affd 828 F.2d 591 (9th

Cir. 1987). In addition, Faust continues to be denied employment from any governmental agency that he has applied to work at, including port agency and city government, and, as well, private employers, because of a felony conviction. In light of these possible adverse consequences, the government can not deny that Faust is suffering severe economic consequences from his conviction.

D. FUNDAMENTAL CONSTITUTIONAL ERROR UNDER ARMSTONG V. UNITED STATES AND SULLIVAN V. LOUISIANA FINDS THERE IS NO HARMLESS ERROR

Structural Constitutional error is never harmless. "When a court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." O'Neal v. McAnish, 115 S.Ct. 992, --L.Ed. 2d--(1995); Robinson v Arvonio, 115 S.Ct. 1247, 131 L.Ed. 2d 129 (1995). The government is illegally seizing private property belonging to Appellant. Armstrong v. United States, 364 U.S. 40 (1960) upholds established Ninth Circuit law that the government can not take away constitutional rights from private individuals where a party had priority rights and priority liens. Mr. Faust has priority admiralty, contract and priority lien rights that supersede any inchoate rights that the government may claim.

> "We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens.

*** ***

> While the Government was obliged to make progress payments based on the percentage of the work completed, nothing in the contract provided that ownership of the portion of the work paid for should vest in the United States. On the contrary, it was stipulated that all progress payments should be secured by a paramount government lien on the property. ... In their totality, these provisions clearly recognize that title was to remain in Rice during performance of the work, and show that private liens could attach to the property while Rice owned it.
>
> *** *** ***
>
> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people to bear burdens which in all fairness, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here. Cf. Thibodo v. United States, 187 F.2d 249 (9th Cir) Armstrong v. United States. 364 U.S. 40, 42,

The District Court previously denied that it had made an error or made a harmless-error review and refused to do any analysis of its directed jury instructions that the government owned the funds, when it fact it can be shown that the government never, never at any time owned any of the funds from any of the three reimbursement checks. Sullivan v. Louisiana, 113 S.Ct. 2078, 2081-83 (1993) proves that the District Court and its reviewing court erred as will be shown by application of this excerpt from Sullivan, supra.

"**It does not fulfill Sixth Amendment requirements to have judges hypothesize that a guilty verdict would have been rendered no matter how overwhelming the evidence of guilt might be**. Id. at 2081-83.

In so far as the possibility of harmless-error review is concerned, the jury instruction error in this case is quite different from the jury-instruction error of erecting a presumption regarding an element of the offense. A mandatory presumption-for example, the presumption that a person intends to ordinary consequences of his voluntary acts--violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Sullivan*, 471 U.S. 307 (1985). But "[when a jury is instructed to presume malice from predicate facts, it still must be find the existence of those facts beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 580 (1986). And when the latter facts "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed." *Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J. concurring in judgment). A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt. *Yates* 111 S.Ct. 1893 supra, at ----,--- (slip op, at 11-13). But the essential connection to a "beyond-a-reasonable-doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings.

A reviewing court can only engage in pure speculation-its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty." *Rose, supra* , at 578.

Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: in Fulminante, we distinguished between, on the one hand "structural defects in the constitution on the trial mechanism, which defy analysis by "harmless-error" standards,' and , on the other hand, trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Fulminante* supra, at --,— (slip op at 6,8. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protection[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose*, supra, at 577. The right to trial by jury reflects, we said, "a profound judgment about the way the which law should be enforced and justice administered. Duncan v. Louisiana, 391 U.S. at 155. The deprivation of that right with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."
Sullivan v. Louisiana, 113 S.Ct.2078, 124 L.Ed. 2d 182 (1993).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE THELTON E. HENDERSON,
JUDGE

UNITED STATES OF AMERICA,	)	No. 04-17196
	)	
Plaintiff,	)	DC#CV-94-2928-DLJ
	)	Northern California
vs.	)	
	)	
THOMAS J. FAUST	)	
	)	
	)	

Doron Weinberg declares under penalty of perjury that the following is true and correct:

I am an attorney licensed to practice in the United States District for the Northern District of California, the United States Court of Appeals for the Ninth District and the United States Supreme Court. I represented petitioner Thomas Faust in the direct appeal of his criminal conviction, which was decided in the published opinion entitled United States v. Faust, 850 F.2d 575 (9th Cir. 1988)

I have been informed that Petitioner Faust has raised the issue of the validity of the trial court's instructions, contending that they circumvented the constitutional requirement that the government prove all elements of the crime beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364 (1970).

In the preparation and presentation of the appeal in United States v. Faust, I did not raise or consider this issue, and I believe that it has not been addressed or ruled upon by this or any other court.

Executed this 15th day of August, 1994 in the City and County of San Francisco, State and Northern District of California.

Doron Weinberg
Doron Weinberg